

## COMMENT

### ANTI-STRIKEBREAKING LEGISLATION—THE EFFECT AND VALIDITY OF STATE-IMPOSED CRIMINAL SANCTIONS

The principal weapon of organized labor in pressing its collective bargaining demands is the strike—a withholding of labor, usually accompanied by picketing and other tactics, in an effort to shut down the employer's business or to make it so unprofitable that he will come to terms with the union rather than suffer a great economic loss. Although section 7 of the National Labor Relations Act<sup>1</sup> guarantees the right of employees to engage in this concerted activity, and section 8(a)(1) forbids employers "to interfere with, restrain, or coerce employees" in the exercise of this right,<sup>2</sup> nowhere does the act guarantee that the strike tactic will be effective in its objectives. Instead, an economic strike might be defeated by a wide range of countermeasures which federal labor policy has left open to employers, including the right of an employer to continue his business with the help of labor replacements.<sup>3</sup> Although the importance and feasibility of hiring replacements to "break" a strike varies according to the industry and other circumstances, it is evident that in those instances where strikers may be successfully replaced the union loses much of its collective bargaining leverage. Despite the increased cost of recruiting and training replacements, the employer may indeed find such a tactic preferable to the alternatives of meeting the union's demands or shutting down completely. Furthermore, the mere threat of replacement may discourage the use of the strike weapon since, if replaced, economic strikers may permanently lose their jobs<sup>4</sup> (and consequently the seniority they have accrued through years of working for a particular employer). It is also likely that the union, in a subsequent certification election, will lose its representation of the shop.<sup>5</sup>

In the past six years the traditional right of employers to hire strike replacements has increasingly come under fire. The International Typographical Union, after having been dealt repeated defeats because of the successful use of labor replacements in strikes against small and

<sup>1</sup> 61 Stat. 140 (1947), 29 U.S.C. § 157 (1964).

<sup>2</sup> 61 Stat. 140 (1947), 29 U.S.C. § 158(a)(1) (1964).

<sup>3</sup> See *NLRB v. Mackay Radio & Tel. Co.*, 304 U.S. 333, 345-46 (1938). See generally Comment, 75 *YALE L.J.* 630 (1966).

<sup>4</sup> Presently, economic strikers are entitled to reinstatement only if the jobs they left were not filled during the strike. See *NLRB v. Mackay Radio & Tel. Co.*, *supra* note 3; *NLRB v. American Mfg. Co.*, 203 F.2d 212 (5th Cir. 1953); *Caldwell Packaging Co.*, 125 N.L.R.B. 495 (1959).

<sup>5</sup> See *Canton Sterilized Wiping Cloth Co.*, 127 N.L.R.B. 1083 (1960); *Manhattan Adhesives Corp.*, 123 N.L.R.B. 1096 (1959).

medium-sized newspapers,<sup>6</sup> drafted in 1960 a model "citizens' job protection bill." Based partly on an existing Pennsylvania statute,<sup>7</sup> it attempts to outlaw certain replacement practices on which the newspaper industry, in particular, has depended. The union has supplemented this by adopting as its model municipal ordinance one passed in Albany, New York, in 1963. Under the joint sponsorship of the ITU and the AFL-CIO, similar state legislation and municipal ordinances have now been enacted in a total of thirteen states and eighty-eight municipalities.<sup>8</sup> Furthermore, an ITU and AFL-CIO-supported federal anti-replacement bill (similar to the state enactments) has recently been introduced in Congress.<sup>9</sup>

Although the provisions of the anti-strikebreaking laws vary to some extent in their details and scope, the general thrust is to prevent an employer involved in a strike, lockout or "labor dispute" from (1) hiring replacements through the aid of third parties not "directly involved" in the labor dispute,<sup>10</sup> (2) recruiting or importing replace-

<sup>6</sup> See note 44 *infra*.

<sup>7</sup> PA. STAT. ANN. tit. 43, § 206 (1964) (enacted in 1937). Pennsylvania was the first state to enact an anti-replacement statute.

<sup>8</sup> In addition to that of Pennsylvania, the other state anti-strikebreaking statutes include: DEL. CODE ANN. tit. 19, § 704 (Supp. 1964); HAWAII REV. LAWS §§ 90C-1 to -3 (Supp. 1965); IOWA CODE § 736B.6 (Supp. 1965); LA. REV. STAT. §§ 23:900-904 (1964); ME. REV. STAT. ANN. tit. 26, §§ 851-56 (Supp. 1966); MD. ANN. CODE art. 100, § 51A (1964); MASS. ANN. LAWS ch. 150D, §§ 1-6 (1965); MICH. STAT. ANN. §§ 17.456(1)-(4) (Supp. 1965); N.H. REV. STAT. ANN. §§ 275-A:1-5 (1966); N.J. STAT. ANN. §§ 34:13C-1 to -6 (1965); R.I. GEN. LAWS ANN. §§ 28-10-10 to -14 (Supp. 1965); WASH. REV. CODE §§ 49.44.100, .110 (1962).

In addition to Albany, the municipalities in which ordinances have been passed include: Akron, Ohio, Albany, Calif., Anderson, Ind., Ashtabula, Ohio, Atlantic City, N.J., Barberton, Ohio, Bayonne, N.J., Belleville, Ill., Belleville, N.J., Berkeley, Calif., Brook Park, Ohio, Buffalo, N.Y., Canton, Ohio, Carteret, N.J., Catlin, Ill., Cheektowaga, N.Y., Chicopee, Mass., Cleveland, Ohio, Cliffside, N.J., Covington, Ky., Denver, Colo., Dunellen, N.J., East Cleveland, Ohio, East Liverpool, Ohio, Edison, N.J., Elizabeth, N.J., Erie, Pa., Fresno, Calif., Gary, Ind., Georgetown, Ill., Hoboken, N.J., Hudson, N.Y., Indianapolis, Ind., Irvington, N.J., Jamestown, N.Y., Jersey City, N.J., Lackawanna, N.Y., Linden, N.J., Lockport, Ill., Lorain, Ohio, Madison, N.J., Madison, Wis., Manchester, N.H., Martinez, Calif., Massillon, Ohio, Metuchen, N.J., Morristown, N.J., Newark, N.J., New Britain, Conn., New Brunswick, N.J., New Haven, Conn., Newport, Ky., New York, N.Y., Niagara Falls, N.Y., Niles, Ohio, North Bergen, N.J., North Tonawanda, N.Y., Orange, N.J., Palo Alto, Calif., Parma, Ohio, Peabody, Mass., Perth Amboy, N.J., Pittsburg, Calif., Plainfield, N.J., Poughkeepsie, N.Y., Poughkeepsie (Town), N.Y., Rahway, N.J., Richmond, Calif., Rochester, N.Y., St. Louis, Mo., Salem, Mass., San Francisco, Calif., San Jose, Calif., Sayreville, N.J., Shively, Ky., Springfield, Ohio, Sunnyvale, Calif., Tilton, Ill., Toledo, Ohio, Trenton, N.J., Troy, N.Y., Union City, N.J., West New York, N.J., Westville, Ill., Wilmington, Del., Woodbridge, N.J., Youngstown, Ohio. (Information about municipal ordinances was supplied by the International Typographical Union).

<sup>9</sup> S. 1781, H.R. 9422, H.R. 10536, H.R. 10623, H.R. 10746, 89th Cong., 1st Sess. (1965) (identical bills).

<sup>10</sup> Section 1 of the proposed "Citizens' Job Protection Law" provides:

It shall be unlawful for any person, partnership, agency, firm or corporation, or officer or agent thereof, to recruit, procure, supply, or refer any person for employment in place of an employee involved in a labor dispute in which such person, partnership, agency, firm, or corporation is not directly interested.

Section 2(a) provides:

It shall be unlawful for any person, partnership, firm or corporation, or officer or agent thereof, involved in a labor dispute . . . to employ any person in

ments from outside the state or city,<sup>11</sup> and (3) hiring "professional strikebreakers,"<sup>12</sup> or persons who have "customarily and repeatedly"<sup>13</sup> worked or offered to work in place of employees involved in a strike, lockout or "labor dispute." Stiff criminal penalties (usually a maximum of one thousand dollars and one year in prison) may be imposed on the employer, the third parties and on the "customary and repeated" replacements themselves.<sup>14</sup> If valid, these laws would go a long way toward guaranteeing a union's power to shut down an employer's business. (At least two municipal ordinances<sup>15</sup> outlaw the hiring of strike replacements altogether.)<sup>16</sup>

place of an employee involved in a labor dispute, who is recruited, procured, supplied or referred for employment by any person, partnership, agency, firm or corporation not directly involved in the labor dispute.

Similar provisions exist in DEL. CODE ANN. tit. 19, § 704 (Supp. 1964); HAWAII REV. LAWS §§ 90C-1(a), (d) (Supp. 1965); IOWA CODE §§ 736B.6(1), (4) (Supp. 1965); LA. REV. STAT. § 23:902 (1964); ME. REV. STAT. ANN. tit. 26, § 852 (Supp. 1966); N.J. STAT. ANN. § 34:13C-2 (1965); PA. STAT. ANN. tit. 43, § 206 (1964).

<sup>11</sup> States forbidding the importation of out-of-state labor replacements include Michigan, MICH. STAT. ANN. § 17.456(3) (Supp. 1965), and New Jersey, N.J. STAT. ANN. § 34:13C-1 (1965).

<sup>12</sup> See, e.g., SAN FRANCISCO, CALIF., POLICE CODE art. 9.5 (1964); CLEVELAND, OHIO, CODIFIED ORDINANCES § 13.112501 (1964).

<sup>13</sup> See, e.g., HAWAII REV. LAWS § 90C-1(b) (Supp. 1965); IOWA CODE § 736B.6(2) (Supp. 1965); ME. REV. STAT. ANN. tit. 26, §§ 853-54 (Supp. 1966); MICH. STAT. ANN. §§ 17.456(1), (2) (Supp. 1965); MD. ANN. CODE art. 100, § 51A (1964); R.I. GEN. LAWS ANN. §§ 28-10-10 to -12 (Supp. 1965).

<sup>14</sup> See, e.g., DEL. CODE ANN. tit. 19, § 704 (Supp. 1964); HAWAII REV. LAWS § 90C-3 (Supp. 1965); LA. REV. STAT. § 23:904 (1964); PA. STAT. ANN. tit. 43, § 206 (1964); NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 42, tit. A (1963). For various other penalties, see, e.g., MASS. ANN. LAWS ch. 150D, § 5 (1965) (\$500 to \$1,000 for first offense, \$1,000 to \$5,000 for subsequent offenses); ME. REV. STAT. ANN. tit. 26, § 856 (Supp. 1966) (\$300 and/or 180 days); MD. ANN. CODE art. 100, § 51A(c) (1964) (\$100 to \$1,000 and/or three years); N.H. REV. STAT. ANN. § 275-A:5 (1966) (\$100 and/or six months); R.I. GEN. LAWS ANN. § 28-10-14 (Supp. 1965) (\$500 and/or one year). Other statutes make the offense simply a misdemeanor, e.g., MICH. STAT. ANN. § 17.456(4) (Supp. 1965); N.J. STAT. ANN. § 34:13C-5 (1964), or a gross misdemeanor. E.g., WASH. REV. CODE §§ 49.44.100, .110 (1962).

<sup>15</sup> Chicopee, Mass., Newark, N.J. The Newark ordinance, passed Feb. 21, 1966, provides:

[I]t shall be unlawful for any person, firm or corporation, to recruit any person or persons for employment, or to secure or to offer to secure for any person or persons any employment when the purpose thereof is to have such persons take the place in employment of employees in an industry or business where a labor strike or a lockout exists.

The ordinance provides a maximum penalty of \$500 and/or ninety days' imprisonment.

<sup>16</sup> Depending on the particular piece of legislation, these basic elements have been shuffled, combined and modified. The Maryland and Rhode Island statutes forbid *third parties* to recruit or furnish professional or "customary and repeated" strikebreakers, MD. ANN. CODE art. 100, § 51A (1964); R.I. GEN. LAWS ANN. § 28-10-10 (Supp. 1965), while the Massachusetts and Washington statutes prohibit third parties from recruiting or importing replacements from out-of-state. MASS. ANN. LAWS ch. 150D, §§ 1, 3 (1965); WASH. REV. CODE § 49.44.100 (1962). Some statutes apply whenever there is a "labor dispute" in existence, e.g., MASS. ANN. LAWS ch. 150D, §§ 1-5 (1965); N.H. REV. STAT. ANN. §§ 275-A:1-5 (1966); CLEVELAND, OHIO, CODIFIED ORDINANCES § 13.112501 (1964), while others are specifically limited to strikes and lockouts. DEL. CODE ANN. tit. 19, § 704 (Supp. 1964); LA. REV. STAT. §§ 23:900-904 (1964); ME. REV. STAT. ANN. tit. 26, §§ 851-56 (Supp. 1966); MICH. STAT. ANN. §§ 17.456(1)-(4) (Supp. 1965); WASH. REV. CODE § 49.44.100 (1962); NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 42, tit. A (1962); SAN FRANCISCO, CALIF., POLICE

Anti-strikebreaking laws have yet been invoked in only two reported cases.<sup>17</sup> In one, the Utah Supreme Court struck down a poorly worded statute as being void for vagueness.<sup>18</sup> In the other, the language of a New York City ordinance<sup>19</sup> was construed as not applicable to the facts, the constitutional questions thus being avoided.<sup>20</sup> In the absence of any significant judicial precedent regarding these laws, it shall be the purpose of this Comment to examine their effect on national labor policy, their desirability from a policy standpoint and their validity.

### *Effects of Anti-Strikebreaking Laws on Union-Employer Relations*

Anti-strikebreaking provisions prohibiting the use of third parties to recruit, refer or furnish replacements severely limit a struck employer's access to labor markets, even through normal channels. They prevent resort to the referral services of employers' associations and, under the terms of most of the laws, prevent referrals by even licensed employment agencies. However, there are a number of ways in which a resourceful employer could probably side-step this type of provision. Since most strikes can be anticipated,<sup>21</sup> the employer could obtain referrals from third parties before the strike is actually called. (This

CODE art. 9.5 (1964). Some further require that a recognized labor union be involved. *E.g.*, DEL. CODE ANN. tit. 19, § 704 (Supp. 1964). Some of the laws specifically require knowledge as an element of the crime. *E.g.*, ME. REV. STAT. ANN. tit. 26, § 856 (Supp. 1966); N.H. REV. STAT. ANN. § 275-A:3 (1966); CLEVELAND, OHIO, CODIFIED ORDINANCES § 13.112501 (1964); NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 42, tit. A (1963). In most statutes the activity legislated against is declared to be unlawful, but in the Massachusetts statute, part of the regulation is accomplished by requiring the employer to register out-of-state replacements and to file certain information with the state as public records. MASS. ANN. LAWS ch. 150D, § 3 (1965). Massachusetts, in addition, forbids the hiring of any strikebreaker known by the employer to have been convicted of a felony within seven years. MASS. ANN. LAWS ch. 150D, § 3 (1965).

Some of the laws make exceptions for common carriers, *e.g.*, N.J. STAT. ANN. § 34:13C-6 (1965), agricultural industries, *e.g.*, DEL. CODE ANN. tit. 19, § 704 (Supp. 1964); LA. REV. STAT. § 23:904 (1964), and licensed or state employment agencies. *E.g.*, DEL. CODE ANN. tit. 19, § 704 (Supp. 1964); PA. STAT. ANN. tit. 43, § 206 (1964); WASH. REV. CODE § 49.44.100 (1962). Although the New Jersey statute excepts the state employment service from general coverage of the statute, the statute forbids it from "knowingly" referring labor replacements. N.J. STAT. ANN. § 34:13C-3 (1965). Under the Louisiana statute and the New York City ordinance, it appears that although licensed employment agencies may refer persons from within the state or city, they may not import persons from outside.

<sup>17</sup> However, there have been arrests and lower court convictions. In what was apparently the first conviction under the 1937 Pennsylvania statute, the Bucks County Court, in April, 1960, fined one Bloor Schleppey \$500 for recruiting labor replacements on behalf of the Bristol Printing Company of Levittown, Pa. No defense was pleaded. Editor & Publisher, April 9, 1960, p. 66.

<sup>18</sup> State v. Packard, 122 Utah 369, 250 P.2d 561 (1952).

<sup>19</sup> NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 42, tit. A (1963).

<sup>20</sup> People v. Eastern Airlines, Inc., 36 Misc. 2d 833, 233 N.Y.S.2d 988 (Sup. Ct. 1962).

<sup>21</sup> Section 8(d)(1) of the Labor Management Relations Act, 61 Stat. 142 (1947), 29 U.S.C. § 158(d)(1) (1964), provides that no party shall terminate or modify an existing collective bargaining contract without giving the other party sixty days' notice of the proposed modification.

might not be permissible under statutes using the term "labor dispute," since such a dispute would generally precede the strike.) Another technique would be for the employer to hire at least one strikebreaker on his own, and make him foreman. This person could then hire other strikebreakers known to him, acting as the employer's agent rather than as a third party.

The provisions regulating or prohibiting the use of replacements from outside the city or state severely limit the area in which an employer can seek replacements, since they set up artificial boundaries to labor supplies and cut across existing labor markets. For example, under the New Jersey statute,<sup>22</sup> Camden employers would be allowed to hire replacements from distant Jersey City, but not from neighboring Philadelphia. The New York City ordinance,<sup>23</sup> like other municipal ordinances, would prevent the hiring of replacements who live in the suburbs.<sup>24</sup>

The provisions regarding "professional strikebreakers" have the effect of denying some employers access to the most willing, reliable and quickly located source of labor replacements.<sup>25</sup> Thus if an employer wishes to replace strikers, he must find nonunion workers who have not yet acted as replacements, or who have done so with such infrequency as not to fall within the indistinct "customary and repeated" definition.

The possible consequences of the "job protection" laws do not stop with strike and lockout situations, since many of the statutes are worded so as to apply whenever the employees replaced are involved in a "labor dispute."<sup>26</sup> Most of the laws do not define the term, although in some states the definition is contained in other labor statutes. The generally accepted definition is found in section 2(9) of the National Labor Relations Act:

The term "labor dispute" includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing,

<sup>22</sup> N.J. STAT. ANN. § 34:13C-1 (1965).

<sup>23</sup> NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 42, tit. A (1963).

<sup>24</sup> The New York City ordinance, however, has been held not to prevent the importation of persons who are already in the employ of the struck employer anywhere else in the country. *People v. Eastern Airlines, Inc.*, 36 Misc. 2d 833, 233 N.Y.S.2d 988 (Sup. Ct. 1962).

<sup>25</sup> See text accompanying notes 35-44 *infra*.

<sup>26</sup> See note 16 *supra*. Some of the laws, including the Washington statute, do not simply apply to the replacement of an employee involved in a strike or lockout, but to the replacement of "employees in a business owned by a person, firm or corporation involved in a labor strike or lockout . . . ." WASH. REV. CODE § 49.44.100 (1962). The purpose of this wording is possibly to include the replacement of persons who refuse to cross picket lines set up by other employees on strike, but the effect would appear far greater. It might mean that whenever any of an employer's employees are on strike, he is restricted in the replacement of *any other* employee who leaves his job during that period, regardless of whether the reason for that employee's leaving was in any way related to the strike.

maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in proximate relation of employer and employee.<sup>27</sup>

Thus, a "labor dispute" does not come into existence only during a strike or lockout, but begins whenever an employee, employees or a union make demands for changes in wages, working conditions or union representation, or when grievances are raised in regard to discharges, alleged violation or interpretation of a contract.<sup>28</sup> Since the anti-strikebreaking laws contain no requirement that the union's demands be reasonable (nor, under most of the laws, that the strike be lawful<sup>29</sup>), the employer might become an easy victim of labor blackmail by the threat of some "labor dispute." It is not necessary that the pressure come from union sources. A few employees, in critical or highly specialized occupations, who could not be replaced without the help of special employment agencies, could close down a company at the expense of thousands of workers. Moreover, in the newspaper industry, to be considered in more detail below,<sup>30</sup> such labor blackmail could even give unions the power to influence editorial policy.<sup>31</sup>

In ascertaining the need for anti-strikebreaking legislation to protect the bargaining position of unions, one of the most startling considerations is the fact that these laws are appearing on the statute books so late in the history of the labor movement. Certainly organized labor's hatred of the practice of labor replacement and of the "scabs" who take the jobs of strikers is not new, since they have always represented a fundamental threat to the strike weapon. Yet, during the long absence of anti-strikebreaking laws, it is clear that the employers' legal right to replace strikers has not rendered the labor movement impotent. If legislators are suddenly to find an overriding need for such legislation, they should first explain how organized labor has been able to achieve its tremendous progress in raising labor standards and attaining political and economic power without it.

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<sup>27</sup> 61 Stat. 137, 29 U.S.C. § 152(9) (1964).

<sup>28</sup> A labor dispute would also exist when the union regularly opens contract negotiations sixty days prior to the expiration of its contract. During the period of negotiations, until a new contract is signed, the employer would be prevented from using any third party to assist him in securing replacements for employees covered by the contract who quit work, and this would include union business agents and chapel chairmen acting as agents for the union in providing replacement employees. If the employer did use a third party he would have committed a felony, according to the particular statute, and so would the third party.

<sup>29</sup> Of the state statutes, only New Jersey requires that the strike be lawful. N.J. STAT. ANN. § 34:13C-1 (1965).

<sup>30</sup> See text accompanying notes 35-44 *infra*.

<sup>31</sup> In 1962, an edition of the *Cleveland Press* was allegedly held up for several hours because a union leader objected to the wording of a political advertisement and would not permit his men to handle the newspaper until the advertisement which offended him was changed. Statement by W. Melvin Street, General Manager, New York State Publishers Association, Before the New York Joint Legislative Committee on Industrial and Labor Conditions, March 9, 1964.

One of the basic reasons for labor's continued bargaining power is that the increased difficulty and expense of operating a plant during a strike, even with the use of replacements, provides some degree of incentive for the employer to reach a peaceful settlement with the union. Furthermore, where a large number of employees is involved, the problem of recruiting a sufficient number of qualified replacements to operate the plant may be insurmountable, and even where this can be accomplished, the union may block the replacements' entrance to the plant by mass picketing and other forms of interference.<sup>32</sup> Many employers in such situations may find other tactics more feasible in mitigating the effects of a strike. These tactics include: continuing operations on a limited basis by using supervisory personnel; stockpiling some of the plant's output prior to the strike so as to maintain a sufficient inventory to fill orders; diversifying business so as to have other plants and enterprises in operation; and subcontracting work to other employers.<sup>33</sup> Another common practice is the "sympathetic lockout," whereby a group of competing employers dealing with the same union agrees that in the event of a "whipsaw" strike (in which the union shuts down the employers one at a time) the others will shut down also.<sup>34</sup> The struck employer's resistance to the strike is increased since he is relieved of competitive pressure, while the union's resistance is decreased because of the additional members put out of work and the resulting drain on any strike fund which the union might have.

Because of the impracticalities mentioned above and the availability of other tactics, the practice of labor replacement is simply not important in most large industries today. Therefore, the effect of the anti-strikebreaking laws cannot be viewed in terms of the labor movement in general, but rather in terms of specific instances in which labor replacement is feasible. Since unions bargaining under such circumstances doubtless find themselves at a greater disadvantage than unions in industries where strikebreaking poses no threat, they would obviously welcome anti-strikebreaking legislation as a way of securing the same bargaining advantage enjoyed by the rest of organized labor. But although such laws may seem fair from labor's standpoint, they completely ignore the vast differences between individual employers in their ability to protect their businesses by tactics other than replacement, and hence their ability to withstand a strike. Since the anti-strikebreaking legislation in question does not outlaw labor replacement as such, but only certain replacement practices, it contains inherent in-

<sup>32</sup> See generally Stewart & Townsend, *Strike Violence: The Need for Federal Injunctions*, 114 U. PA. L. REV. 459 (1966); Note, 113 U. PA. L. REV. 111 (1964).

<sup>33</sup> See MARBY, *LABOR RELATIONS AND COLLECTIVE BARGAINING* 369-71 (1966).

<sup>34</sup> This tactic was held lawful in *NLRB v. Truck Drivers Union*, 353 U.S. 87 (1957). See also *NLRB v. Brown*, 380 U.S. 278 (1965) (upholding use of tactic in conjunction with labor replacements).

equalities in its impact on both employers and unions. It would not cover situations in which an employer could himself find qualified replacements within the state or community, but only those in which he finds it necessary to seek the aid of third parties, import replacements from outside the state or municipality or hire persons who have "customarily and repeatedly" worked or offered to work in place of strikers. The limitation of the laws to these specific practices has a special significance. Although one of the consequences would simply be the increased difficulty of recruiting replacements in any given situation, the primary effect would be to make replacement virtually impossible for those employers who must quickly obtain highly skilled craftsmen of which there is an insufficient number available in any single area.

In addition to their varying effect on different employers, the anti-replacement provisions have a further weakness in that they do not adequately protect employees in many situations. For example, where the employees attempting to strike are small in number, and especially where the jobs they perform are not highly specialized, the employer might easily recruit a sufficient number of qualified replacements without resorting to any of the practices condemned by the laws. An employer, without importing or hiring any professional strikebreakers or collaborating with third parties, might completely fill a small shop with local unemployed. In such a situation, even a union with a large strike fund, and of course small locals with no international affiliation, are powerless in collective bargaining negotiations and wholly unprotected by the anti-strikebreaking laws.

### *Importance of Replacement in the Newspaper Industry*

The probable impact of anti-strikebreaking legislation can probably best be studied in relation to the newspaper industry, since the model legislation which is currently being proposed, and which has recently been enacted in a number of states, was undoubtedly drafted with that industry in mind.<sup>35</sup> The daily newspaper industry is one in which the cessation of operations may be disastrous, since few tactics other than labor replacement are available to mitigate the effects of a strike.<sup>36</sup> Stockpiling is of course impossible, since no one can publish tomorrow's newspaper in advance. If the strike is by employees in the "back shop," it is usually impossible, because of the high degree of skill and specialization required, for nonstriking personnel from other depart-

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<sup>35</sup> The primary draftsman and sponsor of such legislation is the International Typographical Union—the largest and most powerful of the newspaper unions. See text accompanying notes 6-9 *supra*.

<sup>36</sup> Discussions in this Comment regarding replacement practices in the newspaper industry are based on personal observation and information gained by the author while working for the New England Daily Newspaper Association office in Worcester, Mass., during the summers of 1962-1964, and in conversations with personnel of various daily newspapers in 1965-1966.



ments to work as adequate replacements; and it is usually impossible to subcontract to another plant such a large job as publishing a daily newspaper. Furthermore, the losses involved in shutting down a daily newspaper go far beyond the mere expense of unrequited overhead. When a newspaper stops publishing—especially when it has nearby competitors—the readers and advertisers which it has taken years to acquire must switch to other papers. Since reading and subscribing to a certain newspaper are largely habitual, once that habit is broken it may be difficult to reverse the process. Therefore, when the struck paper resumes publishing, a certain percentage of its former patrons may never return.<sup>37</sup>

Despite these pressures, large metropolitan dailies usually do not attempt replacement because of the large number of employees involved. The problem is aggravated because many of their departments—including editorial personnel—are also likely to be unionized and will respect the picket line. Therefore they often resort to the tactic of joining a "sympathetic lockout" agreement with competing newspapers in the same city to mitigate the effects of a whipsaw strike.<sup>38</sup> Such an arrangement is feasible where the newspapers have the same area of circulation and deal with the same unions. It is not generally available to small and medium-sized local papers since they are usually located in different neighboring towns, may not all be unionized to the same extent and usually have nonconcurrent, although overlapping, areas of circulation. Small and medium-sized papers have an advantage over their metropolitan cousins, however, in that union activity is often confined to one or two departments in the back shop, and the number of employees involved in a strike is small enough to allow feasible replacement.

But the provisions contained in the anti-strikebreaking bills, although generally not prohibiting the hiring of replacements per se, are such as virtually to destroy a publisher's ability to operate during a strike. The practices which newspapers use to replace strikers—especially those from the "back shop," where most strikes occur—are based on the limited labor supply available. Since the typographical, stereotyping and pressman jobs all require highly skilled personnel, the publisher cannot simply draw upon the local supply of unemployed, unskilled laborers. Furthermore, these crafts—especially typography—are highly unionized. So the problem is to find a sufficient number

<sup>37</sup> The possibility of a ruinous marathon strike is a realistic threat, especially where a small paper is dealing with powerful unions such as the ITU, since there is almost no limit to the length of time that the international strike fund will allow the local union to hold out. The ITU strike fund, for example, provides strikers with 60% of their regular wages for an indefinite period, sometimes exceeding five years. In addition, each striker is guaranteed, whenever possible, one day's work every week as a substitute for union members in nearby shops, to increase his earnings. See International Typographical Union, Bylaws, art. XXI, § 10 (1966).

<sup>38</sup> See, e.g., *Detroit Newspaper Publishers Ass'n v. NLRB*, 346 F.2d 527 (6th Cir. 1965).

of qualified, nonunion craftsmen who are either unemployed or willing to leave their regular jobs to come to work in the struck plant. It is unlikely that the publisher will be able to find even a handful of such persons in his own community since the specialized nature of a printing tradesman's work usually demands that he live only in places where newspaper jobs are available. Since the struck publisher will need anywhere from a dozen to more than one hundred of these qualified workers, he must therefore import them—certainly from outside the municipality, and almost always from outside the state.

The problem is most serious in the case of the typographers, who comprise by far the largest group in the back shop. The International Typographical Union has a unique means of controlling the labor supply in this trade, for although ITU contracts are ostensibly "open shop," the hiring clauses contained in all such contracts make it virtually impossible for the employer to hire any nonunion journeyman who is not approved by the union.<sup>39</sup> Furthermore, because of the high degree of discipline exercised by the union,<sup>40</sup> it cannot be expected that ITU members can be hired to cross a picket line and work during a strike.

It is a monumental task for the publisher to find prospective replacements outside the city or state, especially in view of the short time in which it must be accomplished in order to maintain daily publication. For this reason publishers usually find it necessary to obtain the assistance of third parties not directly involved in the labor dispute. The use of actual "strikebreaking agencies," in business solely to supply labor replacements for profit, is rare today if it exists at all. But there are other organizations which do supply similar services. Most important are the publishers' associations—including the American Newspaper Publishers Association and similar regional associations—which, as a part of their regular services, maintain files of persons in the various newspaper trades seeking employment. The ANPA or the publisher's regional association manager may know

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<sup>39</sup> The standard apprenticeship clause requires that any person entering the trade must serve a six-year apprenticeship at a fraction of the regular wage scale before he may become a journeyman, and that only one apprentice may be employed for every ten journeymen employed in the plant. (Thus, on the average, it would take sixty years to replace a journeyman.) Nonunion typographers cannot be employed as journeymen in a plant where the ITU has a contract unless they pass a qualifying "examination." However, the hiring clause sets no standards for such an examination, but provides instead that they be agreed upon by a joint committee of management and the union. See *American Newspaper Publishers Ass'n v. NLRB*, 193 F.2d 782 (7th Cir. 1951), *aff'd*, 345 U.S. 100 (1953); *Evans v. International Typographical Union*, 81 F. Supp. 675 (S.D. Ind. 1948); *Evans v. International Typographical Union*, 76 F. Supp. 881 (S.D. Ind. 1948).

<sup>40</sup> Union bylaws provide that each member must contribute 2.5% of his wages to the union pension fund. At the age of sixty he can receive \$22 a week from the fund for the rest of his life if he is in good standing with the union. Since to disobey the union by crossing a picket line would constitute "conduct unbecoming a union member," such action might result in expulsion, causing forfeiture of a member's entire investment in the pension fund. See *International Typographical Union, Constitution art. IX, §§1(a)-(d)* (1966); *International Typographical Union, Bylaws, art. XX, §1, art V, §17* (1966).

which of these persons are currently working in nonunion shops and which of them have been willing to work at struck plants in the past. The ANPA or the regional association may contact other regional associations for such references by telephone, and thereby cover the entire United States if necessary.

The search for replacements makes use of an extensive "grapevine" which includes not only the publishers' associations but individual nonunion tradesmen themselves. It is common that one person who is willing to work as a replacement will know of several other persons in his trade who are either unemployed or dissatisfied with their present jobs. These persons are telephoned by the publisher or by employees of one of the associations, and notified that they would be required to work in place of strikers (since such notice is required by law in some states).<sup>41</sup> If they accept the offer, they are provided with transportation fare and expense allowances which generally cover the time it would ordinarily take to set up permanent residence near the struck plant. They are also generally guaranteed a certain amount of overtime during the first few weeks of the strike, as an additional incentive for them to take the job. In addition, there are also tradesmen who are not initially solicited by the publisher, but who learn of the strike through the news media or by word-of-mouth, and who contact the publisher and offer their services on their own initiative.

For a variety of reasons, the majority of persons hired as replacements generally fall into the category of "professional strikebreakers"—persons who "customarily and repeatedly" accept or offer to accept employment in place of strikers.<sup>42</sup> First of all, they generally must have had a history of employment as replacements in order that the publishers' associations and the other strikebreakers know of their existence. Many of them originally came from nonunion shops in the South, and, because of the difficulty of obtaining employment in union shops, found that their best opportunity for earning the higher wages prevalent in the North was to accept employment in struck plants. Later, if they wished to change employers, the labor replacement situation again opened the way. Secondly, there are only a limited number of people who are willing to change their residence to distant places and to face the uncertainty and possibility of violence inherent in a strike situation. Thus, the persons most willing to work as strike replacements are usually those who have done it before.

<sup>41</sup> See, e.g., CAL. LABOR CODE § 973; CONN. GEN. STAT. REV. § 31-121 (1961); HAWAII REV. LAWS § 90C-1(e) (Supp. 1965); MASS. ANN. LAWS ch. 149, § 22 (1965); PA. STAT. ANN. tit. 43, §§ 607, 608 (1964); R.I. GEN. LAWS ANN. § 28-10-9 (Supp. 1965).

<sup>42</sup> Discussions in this Comment relating to the traits and background of "professional strikebreakers" are based on the author's personal observation of and acquaintanceship with at least two dozen persons who have frequently worked as labor replacements in the typographical trade. These observations were made while the author was employed as a labor replacement at the *Concord* (N.H.) *Monitor* during June and July of 1963, and while employed at the New England Daily Newspaper Association. See note 36 *supra*.

The opportunity to earn large amounts of overtime during the first few weeks of a strike is one of the primary incentives which draw strikebreakers. Although it would be an unfair labor practice for the publisher to offer the replacement greater compensation than was offered to union members,<sup>43</sup> undermanning and unfamiliarity with the particular plant's operation often make extraordinary amounts of overtime a practical necessity. As work within the plant becomes normalized, the publisher will gradually replace the strikebreakers with persons willing to work on a more regular basis—whether they be unskilled local people to be trained on the job or skilled workers elsewhere in the industry. Some of the original strikebreakers may themselves remain with the newspaper on a permanent basis and take up residence in the community, but others will leave as overtime and expense allowances are cut.

The employment of strike replacements in small and medium-sized newspapers throughout the United States has become so common and the means of recruitment so efficient that in a majority of cases a newspaper union cannot force a shutdown except in the big cities.<sup>44</sup> Although some publishers will go to great lengths to avoid the distastefulness of a strike, a strong-willed publisher can use the labor replacement threat to good advantage at the bargaining table. Furthermore, many publishers, in negotiating union contracts, use labor consultants supplied by the same publishers' association that will help provide the replacements if a strike occurs. Even independently hired contract negotiators find it wise to have channels through which replacements can promptly be recruited. For these reasons the anti-strikebreaking laws are of utmost importance to the newspaper trade unions.

### *Public Policy Justifications*

Although the desire for increased bargaining advantage has apparently been the motivating force behind labor's support of anti-

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<sup>43</sup> Cf. *Pacific Gamble Robinson Co. v. NLRB*, 186 F.2d 106, 110 (6th Cir. 1950).

<sup>44</sup> A survey of strike information contained in the ANPA Labor Bulletins for the years 1956-1965 reveals that, out of thirty-six strikes by the ITU against newspapers in cities with a population greater than 250,000, 94.4% resulted in a total shutdown of operations. However, out of eighty-six such strikes in cities with a population of less than 250,000, only 30.2% resulted in a total shutdown, 2.3% resulted in a partial shutdown and in 67.4% of the cases the struck papers were able to continue publication either for the entire duration of the strike or to resume publication within a brief time. The percentages for all cities combined are: total shutdown, 49.2%; partial shutdown, 1.6%; continuation of publication, 49.2%.

(For the purposes of this survey, a "strike" is defined as each instance where an individual newspaper is struck, or involved in a lockout in response to a whipsaw strike, for more than one day, regardless of whether several papers are under joint or the same ownership or are struck simultaneously. It includes, in addition to ordinary bargaining strikes, wildcat strikes, recognitional strikes where more than one union member is employed, breach of contract strikes and three cases where union typographers engaging in contract negotiations quit their jobs in unison instead of striking.)

strikebreaking legislation, allegations of the undesirable effects of strikebreaking practices on the community have been made to justify the passage of these laws.<sup>45</sup> Proponents of the laws have argued that states and municipalities have an interest in protecting the jobs of their citizens from outside labor replacements in order to prevent the loss of wages which would otherwise help support the local economy, the loss of taxes and the necessity for community support of replaced employees by welfare and relief funds. Furthermore, it is argued, strikebreaking ultimately weakens the labor movement within a community, resulting in lower wages and labor standards.<sup>46</sup>

These economic arguments appear to be one-sided, since they ignore cases in which replacement might actually benefit the community. The operation of a business with replacements may provide a continued source of income to the community and service to the public. If the business has other employees whose jobs depend upon the operation of a single department which is on strike, the use of replacements would enable them to continue work, whereas a complete shutdown would force these nonstriking employees out of work also. If the company's business is such that it can survive neither a strike nor the union's demands, the employer might otherwise go out of business completely, with the result that the strikers would lose their jobs anyway, in addition to the permanent loss of jobs of employees in other departments and the loss of a source of income to the community.

Another undesirable result of strikebreaking is the danger of picket line violence, which generally occurs only when an employer attempts to continue operations with replacements and other non-strikers.<sup>47</sup> But almost without exception, such violence is attributable to acts either directly committed or provoked by union pickets in their attempt to bar lawful entrance to the struck plant by mass picketing.<sup>48</sup> There are two basic alternatives which may be used to eliminate this problem: (1) restraining the pickets, who are the direct cause of the violence, or (2) turning back the replacements, thus avoiding violence by appeasing the pickets. The second alternative is obviously more desirable from the union's standpoint, since it puts state and local government on the side of the strikers. Local officials may also find that controlling the activities of employers would be more expedient

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<sup>45</sup> See International Typographical Union, *Facts About Professional Strikebreakers*; International Typographical Union, *Rats For Hire—The Story of Professional Strikebreakers*; Van Arkel, *Citizens' Job Protection Laws* (undated pamphlets obtainable from the ITU, on file in Biddle Law Library, University of Pennsylvania). The pamphlet by Van Arkel, ITU General Counsel, attempts to justify anti-strikebreaking laws as within the permissible scope of state police power.

<sup>46</sup> See *ibid.*

<sup>47</sup> See Stewart & Townsend, *Strike Violence: The Need for Federal Injunctions*, 114 U. PA. L. REV. 459 (1966).

<sup>48</sup> See Note, *The Enforcement of the Right to Access in Mass Picketing Situations*, 113 U. PA. L. REV. 111 (1964).

than controlling the acts of the pickets, which would involve the burden of extra police duty<sup>49</sup> and possible political repercussions.<sup>50</sup>

But even if such policy considerations are acceptable, the anti-strikebreaking provisions in question seem somewhat inconsistent with the aim of eliminating picket line violence. It seems likely that such violence will arise regardless of whether the persons attempting to cross the picket line are newly hired replacements or simply nonstriking personnel, and regardless of whether the replacements are hired by third parties, brought in from outside the state or "professional strikebreakers." It could be argued, however, that such restrictions do have a bearing on picket line violence in that their effect would be to limit the number of persons who could be recruited to cross the picket line and to decrease the likelihood that an employer would be able to continue operations during the strike.

It has been suggested that public policy should condemn persons who profit from industrial strife and who encourage it by making labor replacements readily available.<sup>61</sup> Such an argument is aimed at third parties, not directly involved in the labor dispute, who assist the employer by recruiting, supplying or referring replacements. Although the main target is said to be "strikebreaking agencies," the legislative provisions in question would apply to anyone, even if the referral of replacements was not his principal line of business, or if he received no compensation for such assistance. Such people are unlikely purposely to foment strikes.

A similar policy argument against the exploitation and encouragement of industrial strife has been applied to "professional strikebreakers," or persons who "customarily and repeatedly" work or offer to work as labor replacements, so as to justify laws which prohibit their hiring as replacements. It has been alleged that such persons are of no benefit to a community because their only interest is to reap income and then move on, and that in the meantime they pose a threat to public welfare because of their generally undesirable character. The International Typographical Union, in its literature supporting anti-strikebreaking laws, has cited numerous instances in which labor replacements have been involved in crime, the carrying of weapons and disorderly conduct.<sup>62</sup> In actuality, however, such occurrences appear to be extremely rare. Nevertheless, there are probably some personality traits common to those persons who engage in "professional strikebreaking." In the newspaper industry, for example, strikebreak-

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<sup>49</sup> *Id.* at 123-28.

<sup>50</sup> See Stewart & Townsend, *supra* note 47, at 465-71.

<sup>61</sup> International Typographical Union, *Rats for Hire—The Story of Professional Strikebreakers* (undated pamphlet obtainable from the ITU, on file in Biddle Law Library, University of Pennsylvania).

<sup>62</sup> See International Typographical Union, *Facts About Professional Strikebreakers* (undated pamphlet obtainable from the ITU, on file in Biddle Law Library, University of Pennsylvania).

ing generally attracts persons with a rootless, restless character who are motivated not only by the money, but by the travel and the excitement and challenge of putting out a paper under strike conditions.<sup>53</sup> Some may seek work as replacements because the ITU hiring clauses limit their opportunities to obtain regular jobs elsewhere, and such persons frequently remain as regular employees long after the strike has been defeated. Others, however, may have become strikebreakers because of such problems as alcoholism and emotional instability which make it impossible for them to hold steady jobs. These traits usually do not come to the surface until after the initial excitement of the strike has abated, and when their behavior becomes a serious problem, employers usually discharge them as quickly as possible. It is probably true that a struck employer is compelled by the circumstances to hire persons of lower moral character than he would usually require; however, a person with a known history of serious trouble will generally not be hired as a replacement unless it is absolutely necessary.

*Validity Under the Due Process Clause*<sup>54</sup>—*Vagueness*

Many of the anti-strikebreaking provisions, in their present form, seem to violate the due process requirement that statutes should not be so vague in their language that an ordinary person is unable to determine what behavior constitutes the offense.<sup>55</sup> In *State v. Packard*,<sup>56</sup> the only case in which an anti-strikebreaking law has yet been constitutionally tested, the Utah Supreme Court struck down a 1952 statute on these grounds. The statute required "every person before *commencing employment* with any person, firm or corporation whose employees are out on labor strike *called by a national[ly] recognized union* to register with the industrial commission of Utah."<sup>57</sup> The court held that since an ordinary person could not be expected to know what was meant by "a nationally recognized union" or whether such a union had called the strike, the statute was unconstitutionally vague.<sup>58</sup> The anti-strikebreaking provisions discussed in this Comment also raise serious questions in this regard.

<sup>53</sup> See note 42 *supra*.

<sup>54</sup> Any argument that the anti-replacement laws violate substantive economic due process has probably been foreclosed by Supreme Court decisions since 1937. See, e.g., *Williamson v. Lee Optical*, 348 U.S. 483 (1955); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). But see *Wilson & Co. v. Freeman*, 176 F. Supp. 520 (D. Minn. 1959). However, this doctrine may still have influence in some state courts. See generally Hetherington, *State Economic Regulation and Substantive Due Process of Law*, 53 Nw. U.L. Rev. 226 (1958).

<sup>55</sup> See *Champlin Ref. Co. v. Corporation Comm'n*, 286 U.S. 210, 243 (1932); *Cline v. Frink Dairy Co.*, 274 U.S. 445, 465 (1927); *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926).

<sup>56</sup> 122 Utah 369, 250 P.2d 561 (1952).

<sup>57</sup> *Id.* at 371, 250 P.2d at 562. (Emphasis added.)

<sup>58</sup> *Id.* at 376-79, 250 P.2d at 564-65. The court also held that the distinction between nationally recognized and other unions violated equal protection. *Id.* at 379-80, 250 P.2d at 566.

One of the most typical provisions makes it a crime for any person to hire as a labor replacement a "professional strikebreaker"<sup>59</sup> or "any person who customarily and repeatedly offers himself for employment in the place of employees involved in a labor strike or lockout."<sup>60</sup> An accompanying provision also makes it a crime for any such "professional strikebreaker" or person who comes under the "customarily and repeatedly" definition to take or offer to take the place in employment of employees involved in a labor dispute.<sup>61</sup> Although the terms "professional strikebreaker" and "customarily and repeatedly" probably apply to persons who make it their primary business to travel from one strike to another, and not to persons who have worked or offered to work only once, it is questionable whether they provide sufficient guidelines for an ordinary person to determine whether he, or the person he is hiring, has crossed the borderline into the proscribed category.<sup>62</sup>

Many of the anti-strikebreaking statutes use the term "labor dispute" to determine when the law applies and whether a labor replacement has worked or offered to work as such previously.<sup>63</sup> This term might be held unconstitutionally vague since it is usually undefined in the statutes, and most states do not define it elsewhere in their labor legislation. It is doubtful that an ordinary person would be familiar with the broad definition of "labor dispute" found in section 2(9) of the National Labor Relations Act,<sup>64</sup> or would be able, by personal observation, to determine whether such a dispute existed in the absence of an actual strike or lockout.<sup>65</sup> A further objection arises

<sup>59</sup> *E.g.*, NEW YORK, N.Y., ADMINISTRATIVE CODE ch. 42, tit. A (1963).

<sup>60</sup> *E.g.*, ME. REV. STAT. ANN. tit. 26, § 853 (Supp. 1966).

<sup>61</sup> *E.g.*, N.H. REV. STAT. ANN. § 275-A:2 (1966).

<sup>62</sup> Supporters of the anti-strikebreaking provisions, on the other hand, might cite Justice Holmes' observation that "the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury subsequently estimates it, some matter of degree." *Nash v. United States*, 229 U.S. 373, 377 (1913). There are many instances where the Supreme Court has upheld criminal statutes phrased in seemingly indefinite or relative terms. See *Omaechevarria v. Idaho*, 246 U.S. 343 (1918), in which a statute forbidding the grazing of sheep on public domain on "ranges" previously occupied by cattle, or "usually" occupied by cattle raisers was upheld as being sufficiently definite in its terms. Nevertheless, it is usually required that some standard of guilt be found either in the statutory language, in the judicial history of the words used or in some widely accepted concept of "reasonableness." For example, the criminal provisions of the Sherman Act are based on the terms "restraint of trade" and "attempts to monopolize." Although this language is seemingly indefinite, the Supreme Court in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), held that it was not impermissibly vague since the terms used had their origin in the common law and were familiar in the law of the United States prior to and at the time of the adoption of the act. Furthermore, Chief Justice White, speaking for a majority of the Court, indicated that the statute was saved from the charge of vagueness by the fact that its terms would be interpreted according to the "rule of reason." *Id.* at 66.

<sup>63</sup> *E.g.*, MASS. ANN. LAWS ch. 150D, § 2 (1965).

<sup>64</sup> 61 Stat. 137, 29 U.S.C. § 152(9) (1964), quoted in text at note 27 *supra*.

<sup>65</sup> In *Cole v. Arkansas*, 338 U.S. 345 (1949), the Supreme Court upheld, over objections on the ground of vagueness, a statute which made it unlawful "for any person acting in concert with one or more other persons, to assemble at or near any



from the fact that many of the anti-strikebreaking laws do not include knowledge or "scienter" as an element of the offense.<sup>66</sup> Since most states do not now require notification of the existence of a "labor dispute,"<sup>67</sup> an ordinary person would probably not know whether "labor disputes" existed in places where he had applied for work in the past. It might also be impossible for an employer to know whether a person he is hiring has worked or applied for work as a replacement in places where there were labor disputes unless the person being hired knows himself and tells the employer.

The question of vagueness, however, is not crucial to the basic objectives of anti-strikebreaking legislation, since the problems might be resolved either by narrow construction of the vague terms by state courts or by careful drafting. For example, the anti-strikebreaking statutes in some states have been drafted so as to apply only to "knowing violations."<sup>68</sup> The Maine statute clarifies the definition of a

place where a 'labor dispute' exists and by force or violence prevent or attempt to prevent any person from engaging in any lawful vocation, or for any person . . . to promote, encourage or aid any such unlawful assemblage . . . ." ARK. STAT. ANN. § 81-207 (1960). As applied in that case, against mass pickets, the use of the term "labor dispute" does not raise any due process problems, since obviously union members would not be blocking access to a plant without realizing that a strike was in progress.

<sup>66</sup> One of the arguments the Supreme Court has sometimes relied on to uphold an otherwise vague statute has been the notion that the defendant had "scienter," or guilty knowledge, which served to clarify the uncertainty. A statute is easier to uphold against a charge of vagueness if it applies only to a knowing violation or if the offense is one which requires a specific intent. See *Boyce Motor Lines, Inc. v. United States*, 342 U. S. 337 (1952); *Hygrade Provision Co. v. Sherman*, 266 U. S. 497 (1925). It seems that clarificatory "scienter" must consist of more than what the term implies at common law—the mere knowing performance of an act with the intent to bring about the proscribed conduct, regardless of whether the defendant knew that the act was proscribed. Clarificatory "scienter" must envisage not only a knowledge of what is done, but a knowledge that what is done is unlawful, or at least so morally "wrong" that it is probably unlawful. See Note, *The Void-for-Vagueness Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 87 n.98 (1960).

But under the anti-strikebreaking provisions in question it is not the act itself that is wrong—for the statute does not outlaw the replacement of strikers. Nor does the act change in character, no matter how many times it is committed. Instead, the judgment which the strikebreaker must make is whether or not he falls into a certain category of persons forbidden to engage in an otherwise lawful act. See *Lanzetta v. New Jersey*, 306 U.S. 451 (1939), in which the Supreme Court held unconstitutionally vague a statute prohibiting "gangsters" from carrying certain weapons, where the prohibited class was defined as "any person not engaged in any lawful occupation," known to be a member of a gang of two or more persons, and convicted at least three times of crime. The class determination in the present case is fraught with interpretational difficulties. For example, under one possible interpretation of the language a person might cease to fall within the proscribed category after having abstained from labor replacement for a period of time. This might allow a person to balance his strikebreaking and non-strikebreaking activities so that he will be working as a labor replacement less than half the time. On the other hand, it is possible that the words "customarily and repeatedly" could be interpreted to cover this situation also. The type of judgment which would be involved seems too uncertain to be demanded of a person of ordinary intelligence, especially where the law offers insufficient guidance as to what is actually prohibited, and where the acts forbidden are never in themselves made illegal. For other cases involving indefiniteness as to what persons are within the scope of legislation, see *United States v. Cardiff*, 344 U.S. 174 (1952); *Winters v. New York*, 333 U.S. 507 (1948); *State v. Hill*, 189 Kan. 403, 369 P.2d 365 (1962).

<sup>67</sup> *E.g.*, WIS. STAT. § 103.43 (Supp. 1966).

<sup>68</sup> *E.g.*, N.H. REV. STAT. ANN. § 275-A:2 (1966).

professional strikebreaker by providing that it shall be prima facie evidence of "customarily and repeatedly" seeking to act as a replacement if the person has offered two times previously to take the place of a person involved in a strike or lockout.<sup>69</sup> The vagueness surrounding the term "labor dispute" has been avoided in the statutes of some states by simply referring only to situations where there is a "strike or lockout."<sup>70</sup>

### *Validity Under the Commerce Clause*

It has been suggested that statutes and ordinances which regulate or prohibit the importation of labor replacements from outside the state or city may go beyond the state's power to interfere with the movement of persons in interstate travel.<sup>71</sup> This argument is based on *Edwards v. California*,<sup>72</sup> in which the Supreme Court struck down a California statute which made it a misdemeanor for any person to bring or assist in bringing into the state any indigent person. The Court rejected the contention that the exclusion of indigents was within the state's police power, and held that the transportation of persons is within the scope of interstate commerce, which only Congress may regulate. The Court declared that although the states are not precluded from exercising their police power in matters of local concern, even though they may thereby affect interstate commerce, the prohibition in question did not come within the permissible scope of state police power.

The statute involved in the *Edwards* case was passed in response to conditions existing during the Depression—in particular, the migration of large numbers of indigent persons into the state in search of employment or public relief. The state took the position that its first obligation was to provide for its own resident unemployed, and that the arrival of nonresident indigents would result in the sapping of public welfare funds and the taking of jobs that might have otherwise gone to residents. The Court rejected this argument, declaring that, of the boundaries to the permissible area of state legislative activity, "none is more certain than the prohibition against attempts on the part of any single State to isolate itself from difficulties common to all of them by restraining the transportation of persons and property across its borders."<sup>73</sup>

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<sup>69</sup> ME. REV. STAT. ANN. tit. 26, § 855 (Supp. 1966).

<sup>70</sup> See, e.g., LA. REV. STAT. § 23:901 (1964).

<sup>71</sup> 77 HARV. L. REV. 377, 380-81 (1963).

<sup>72</sup> 314 U.S. 160 (1941).

<sup>73</sup> *Id.* at 173. The importation provisions of the anti-replacement laws probably do not violate the privileges and immunities clause of article IV of the Constitution, which prohibits only discrimination based on "citizenship." *Douglas v. New York, N.H. & H.R.R.*, 279 U.S. 377 (1929). In the *Douglas* case, a New York venue statute which limited the circumstances under which state courts could accept jurisdiction in cases brought by nonresident plaintiffs was attacked by a nonresident as violative

Although the anti-replacement provisions in question place a restriction upon the recruitment of employees from the national labor market, the present statutes are more related to a legitimate state interest than that struck down in *Edwards*. "The police power of a state extends beyond health, morals and safety, and comprehends the duty, within constitutional limitations, to protect the well-being and tranquility of a community."<sup>74</sup> The regulation of strikebreaking, because of its relation to violence and labor strife, certainly comes within the scope of state police power. Moreover, the statute in *Edwards* excluded an entire segment of the population, while the anti-replacement provisions do not exclude the strike replacements as persons, but only their importation for a particular purpose. Furthermore, the type of statute invalidated by the Court in *Edwards* would have had a much more pervasive effect on the national economy—if retaliatory measures had been passed in sister states, all interstate economic relocation throughout the country would have been prevented. The limited effect of the anti-replacement laws would pose no such threat. Balancing the states' interest in preventing picket line violence against the amount of the burden on interstate commerce, it seems unlikely that the anti-replacement laws would be held to be an unconstitutional intrusion by the states into the area which is committed to the exclusive regulation of Congress. However, the state legislation might still be held to be invalid if it could be found that Congress had exercised its power to regulate the practice of strikebreaking, thereby preempting state regulation of the same area.

### *Preemption by Federal Statutes*

There are two federal statutes which arguably preempt state anti-replacement laws. The first of these is the Byrnes Act, passed in 1936, which makes it a felony for anyone willfully to transport in interstate or foreign commerce "any person who is employed or is to be employed for the purpose of obstructing or interfering by force or threats with (1) peaceful picketing by employees during any labor controversy affecting wages, hours, or conditions of labor, or (2) the exercise by employees of any of the rights of self-organization or collective bargaining," and also makes it a felony for anyone to travel in interstate or foreign commerce for any of these purposes.<sup>75</sup>

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of his privileges and immunities. The Court upheld the legislation on the ground that it applied equally to nonresidents who were citizens of New York and nonresidents who were citizens of other states. *Id.* at 387. Similarly, the anti-strikebreaking provisions in question could probably be defended on the narrow ground that they simply outlaw the importation of replacements regardless of the citizenship of the persons imported. Under the reasoning of the *Douglas* case, this argument would prevail regardless of the great correlation between citizenship, residence and place of recruitment. *But see* *Blake v. McClung*, 172 U.S. 239 (1898).

<sup>74</sup> *Kovacs v. Cooper*, 336 U.S. 77, 83 (1949).

<sup>75</sup> 18 U.S.C. § 1231 (1964).

The "strikebreakers" regulated by the Byrnes Act were obviously, on the face of the statute, not mere labor replacements but armed guards and "goon squads" used to harass and intimidate strikers and break up picket lines. The Byrnes Act has not been very effective since, in the only case in which it has been invoked in a prosecution, the defendants apparently were acquitted because requisite intent could not be shown to have existed at the time the strikebreakers were transported across state lines.<sup>76</sup> It is significant that although this act was passed in a decade characterized by industrial strife and pro-labor legislation, Congress made no effort to prevent employers from hiring persons as replacements for strikers. It can be argued that Congress well recognized the problems involved, and in passing a law which prohibited only the interstate transportation of persons to interfere with peaceful picketing and self-organization by force or threats, Congress chose to permit the interstate transportation of persons for the purpose of merely replacing strikers.<sup>77</sup> An extensive discussion of the effect of the Byrnes Act is not really necessary, however, since preemption is sufficiently established under a second, more encompassing, act of Congress.

The National Labor Relations Act<sup>78</sup> appears to preempt all state and municipal anti-strikebreaking laws insofar as they apply to businesses within the jurisdictional guidelines<sup>79</sup> of the National Labor Relations Board. Grounds for preemption must be drawn from the purpose and effect of the act, since it does not on its face dispose of the issue of strikebreaking. Although various language contained within it apparently refers to situations in which strikers have been replaced,<sup>80</sup> thus indicating congressional recognition of the existence of the practice of labor replacement, nowhere does the act specifically protect from state interference the right of employers to replace strikers. Cases, such as *NLRB v. Mackay Radio & Tel. Co.*,<sup>81</sup> which recognize management's right to hire labor replacements, have been based simply

<sup>76</sup> *United States v. Bergoff*, CCH LAB. L. REP. ¶¶ 3810.05, 5180.03 (D. Conn. 1937). The case is unreported, but the CCH comment suggests that failure to show the requisite intent caused their acquittal.

<sup>77</sup> See 80 CONG. REC. 10218-22 (1936); 79 CONG. REC. 14105-06 (1935).

<sup>78</sup> 61 Stat. 136 (1947), as amended, 29 U.S.C. §§ 141-87 (1964).

<sup>79</sup> See National Labor Relations Act § 14(c), 61 Stat. 151 (1947), as amended, 29 U.S.C. § 164(c) (1964).

<sup>80</sup> Section 2(3), 61 Stat. 137 (1947), 29 U.S.C. § 152(3) (1964), provides:

The term "employee" shall include . . . any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment . . . .

Section 9(c)(3), 61 Stat. 144 (1947), as amended, 29 U.S.C. § 159(c)(3) (1964), grants voting rights to permanently replaced economic strikers:

Employees engaged in an economic strike who are not entitled to reinstatement shall be eligible to vote under such regulations as the Board shall find are consistent with the purposes and provisions of this Act in any election conducted within twelve months after the commencement of the strike . . . .

<sup>81</sup> 304 U.S. 333 (1938).

upon the failure of the act to prohibit this practice. It has been held that the National Labor Relations Act at least preempts state legislation attempting to regulate practices which are either protected or prohibited by the act.<sup>82</sup> If the doctrine of preemption were to depend only upon the strict wording of the act, it would appear that since the practice of replacement is neither explicitly protected nor prohibited, state regulation of such conduct would be permissible.

However, the Supreme Court has stated that in determining the question of preemption, it is necessary to examine whether the underlying policy of the federal legislation would be frustrated by the state law in question.<sup>83</sup> The National Labor Relations Act constitutes a comprehensive and detailed scheme for the regulation of labor disputes.<sup>84</sup> The avowed purpose of the statute is

to provide orderly and peaceful procedures for preventing the interference by either [employers or employees] with the legitimate rights of the other . . . to define and proscribe practices on the part of labor and management which affect commerce and are inimical to the general welfare, and to protect the rights of the public in connection with labor disputes affecting commerce.<sup>85</sup>

It would appear that the regulation of labor replacement practices would fall within this broad statement of policy. There are two specific arguments in support of this proposition.

The first is that anti-strikebreaking laws would interfere with the system of collective bargaining set up by the federal act. In the National Labor Relations Act, Congress has attempted to protect the effectiveness of the bargaining process by setting guidelines as to the practices that may be engaged in by management and labor in pressing their demands. By allocating a certain choice of economic weapons to each side, Congress has set up a balance of power with which state law will not be allowed to interfere. This is true whether or not the economic weapon in question is specifically protected by the act.

Thus, in *Local 20, Teamsters Union v. Morton*,<sup>86</sup> the Supreme Court reversed a lower court judgment against the union, which had been based on Ohio common law, for inducing other employers to boycott the primary employer. Section 303 of the Labor Management Relations Act,<sup>87</sup> while allowing recovery against a union for inducing other employees to engage in a secondary boycott, does not specifically

<sup>82</sup> San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

<sup>83</sup> Local 20, Teamsters Union v. Morton, 377 U.S. 252, 258 (1964).

<sup>84</sup> See San Diego Bldg. Trades Council v. Garmon, 359 U.S. 236 (1959).

<sup>85</sup> Section 1(b), 61 Stat. 136 (1947), 29 U.S.C. § 141(b) (1964).

<sup>86</sup> 377 U.S. 252 (1964).

<sup>87</sup> 61 Stat. 158 (1947), as amended, 29 U.S.C. § 187 (1964).

protect or prohibit the practice of inducing other *employers* to boycott. Nevertheless, the Court held:

Allowing its use is a part of the balance struck by Congress between the conflicting interests of the union, the employees, the employer and the community . . . . If the Ohio law of secondary boycott can be applied to proscribe the same type of conduct which Congress focused upon but did not proscribe when it enacted § 303, the inevitable result would be to frustrate the congressional determination to leave this weapon of self-help available, and to upset the balance of power between labor and management expressed in our national labor policy.<sup>88</sup>

Since the right to replace strikers existed prior to the National Labor Relations Act, it seems likely that Congress presupposed the existence of this power when it protected the rights of strikers, and that in setting up the balance which it did, Congress assumed that the right to replace strikers would continue. Therefore, any attempt by a state to interfere with the power of an employer to resist a strike by hiring replacements goes right to the heart of collective bargaining.

The second ground for preemption is that anti-strikebreaking laws, in their attempt to strengthen the effectiveness of the strike weapon, encroach upon the primary jurisdiction of the National Labor Relations Board to determine what employer activities constitute unfair labor practices. Section 8(a)(1)<sup>89</sup> of the federal act forbids employers "to interfere with, restrain, or coerce employees" in the exercise of their right to strike and engage in other concerted activities. The Supreme Court has held that whenever an activity is "arguably subject" to this section, "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."<sup>90</sup> There are repeated examples in which employer tactics in response to a strike—including certain replacement practices—have been held unlawful by the NLRB. For example, it has been held that an employer's grant of "superseniority" for replacements and non-strikers in an economic strike may constitute an unfair labor practice giving replaced strikers a right to reinstatement.<sup>91</sup> It has also been held an unfair labor practice for an employer to hire replacements after the end of an economic strike and after the strikers have applied unconditionally for reinstatement.<sup>92</sup> Since the NLRB has in these and

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<sup>88</sup> *Local 20, Teamsters Union v. Morton*, 377 U.S. 252, 259 (1964).

<sup>89</sup> 61 Stat. 140 (1947), as amended, 29 U.S.C. § 158(a)(1) (1964).

<sup>90</sup> *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 245 (1959).

<sup>91</sup> *NLRB v. Erie Resistor Corp.*, 373 U.S. 221 (1963).

<sup>92</sup> *NLRB v. Shenandoah-Dives Mining Co.*, 145 F.2d 542 (10th Cir. 1944).

other situations held labor replacement to be an unfair labor practice, it seems that such activities fall within the scope of the federal act, and state regulation of these matters is preempted.<sup>93</sup>

Such preemption exists regardless of the fact that the anti-strikebreaking laws supplement rather than detract from federal regulation of labor replacement practices. In *Rice v. Santa Fe Elevator Corp.*,<sup>94</sup> the Supreme Court stated:

The test . . . is whether the matter on which the State asserts the right to act is in any way regulated by the Federal Act. If it is, the federal scheme prevails though it is a more modest, less pervasive regulatory plan than that of the State.<sup>95</sup>

In the labor area, however, federal preemption does not completely preclude all exercise of state police power. The Supreme Court has indicated that a state may act where the activity regulated is "a merely peripheral concern of the Labor Management Relations Act . . . or where the regulated conduct [touches] interests so deeply rooted in local feeling and responsibility that, in the absence of compelling congressional direction, we could not infer that Congress had deprived the States of the power to act."<sup>96</sup> Such state interests have been generally characterized as those dealing with the maintenance of domestic peace against conduct marked by violence and imminent threats to the public order,<sup>97</sup> and those dealing with traditional breach of contract problems.<sup>98</sup> States and municipalities therefore have not been precluded from outlawing mass picketing and other activity which may result in industrial violence.<sup>99</sup> On the other hand, the mere danger of picket line violence is not sufficient to permit states to in-

<sup>93</sup> See 77 HARV. L. REV. 377, 379 (1963).

<sup>94</sup> 331 U.S. 218 (1947).

<sup>95</sup> *Id.* at 236.

<sup>96</sup> *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 243-44 (1959).

<sup>97</sup> See, e.g., *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266 (1956); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954).

<sup>98</sup> See, e.g., *International Ass'n of Machinists v. Gonzales*, 356 U.S. 617 (1958). But see *id.* at 623 (Warren, C.J., and Douglas, J., dissenting).

<sup>99</sup> The National Labor Relations Board has held that picketing calculated to prevent nonstriking workers from entering the plant is a union unfair labor practice because it interferes with the nonstrikers' right to refrain from concerted action. See, e.g., *Local 2772, United Steelworkers (Vulcan-Cincinnati Corp.)*, 137 N.L.R.B. 95 (1962); *Local 5895, United Steelworkers (Carrier Corp.)*, 132 N.L.R.B. 127 (1961); *Local 3887, United Steelworkers (Stephenson Brick & Tile Co.)*, 129 N.L.R.B. 6 (1960); *Local 1150, United Elec. Workers (Cory Corp.)*, 84 N.L.R.B. 972 (1949). In spite of the existence of the federal remedies, the Supreme Court has consistently held that the preemption doctrine does not take from the states the "power to prevent mass picketing, violence, and overt threats of violence." *UAW v. Wisconsin Employment Relations Bd.*, 351 U.S. 266, 274 (1956). See also *UAW v. Russell*, 356 U.S. 634 (1958); *Youngdahl v. Rainfair, Inc.*, 355 U.S. 131 (1957); *United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656 (1954).

fringe upon such protected activities as "stranger picketing" by persons who are not employees of the business being picketed.<sup>100</sup>

It seems clear that the anti-strikebreaking laws do not fall within the limited range of state action permitted by federal labor policy. Although states may have a justifiable interest in preventing picket line violence, there are more direct methods by which this can be accomplished (*e.g.*, outlawing mass picketing) which would have a less disruptive effect on federal policy. The economic justifications for anti-strikebreaking laws are, for preemption purposes, completely outside the area in which the states may act, since they involve questions of labor policy which Congress has already chosen to resolve on the federal level. The "job protection" aspect of the laws is specifically preempted by section 10(c) of the National Labor Relations Act, which authorizes the NLRB to reinstate with back pay any employee who is injured by an unfair labor practice.<sup>101</sup> It seems clear, furthermore, that the principal purpose and effect of the laws is not merely within the "peripheral concern" of the federal act. Rather, these laws attempt to protect the power of employees in regard to collective bargaining and concerted activities, thus encroaching on one of the principal objectives of the federal legislation.<sup>102</sup>

### *Finding an Alternative for Regulating the Use of Replacements*

Although the anti-strikebreaking laws discussed in this Comment are for many reasons unacceptable in their present form, problems are raised by the practice of labor replacement which are nevertheless

<sup>100</sup> See *Waxman v. Virginia*, 371 U.S. 4, reversing *per curiam* 203 Va. 257, 123 S.E.2d 381 (1962). The Supreme Court reversed the affirmation of a conviction under a Virginia statute prohibiting "stranger picketing." To support its reversal, the Court only cited *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959).

<sup>101</sup> 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

<sup>102</sup> Municipal anti-strikebreaking ordinances might run afoul not only of federal, but of state preemption. Many states have enacted their own labor relations acts (which take effect in cases over which the National Labor Relations Board declines or lacks jurisdiction). See, *e.g.*, COLO. REV. STAT. ANN. §§ 80-4-1 to -22 (1963); HAWAII REV. LAWS §§ 90-2, 90-3, 90-6, 90-7, 90-10, 90-12 (Supp. 1965); KAN. GEN. STAT. ANN. §§ 44-807 to -815 (1964); MASS. ANN. LAWS ch. 150A, §§ 1-12 (1965); MICH. STAT. ANN. §§ 17.454(10.4), (11), (14), (14.2), (14.8), (17), (18), (23), (25), (28)-(32) (Supp. 1965); MINN. STAT. §§ 179.01-.60 (1966); N.Y. LAB. LAW §§ 700-717; PA. STAT. ANN. tit. 43, §§ 211.1-.13 (1964); R.I. GEN. LAWS ANN. §§ 28-7-16, -29, -45 (Supp. 1965); WIS. STAT. §§ 111.03, .06 (Supp. 1966).

In *In re Hubbard*, 62 Cal. 2d 119, 396 P.2d 809, 41 Cal. Rptr. 393 (1964), the California Supreme Court made it clear that municipalities may not legislate concerning matters in which the field has been occupied by state law. See also *In re Lane*, 58 Cal. 2d 99, 372 P.2d 897, 22 Cal. Rptr. 857 (1962); *Chavez v. Sargent*, 52 Cal. 2d 162, 339 P.2d 801 (1959). After considering existing state statutes regulating the sending of part-time employees to work as replacements in the plant of another employer, and prohibiting the recruitment of transportation of replacements without notifying them of the existence of a strike or lockout, the Attorney General of California has handed down a recent opinion concluding that proposed municipal anti-strikebreaking ordinances were preempted by state law. Opinions of the Attorney General of Calif., No. 64/301 (June 22, 1965). It appears that the same reasoning can be applied in many other states having similar regulatory statutes—especially where state anti-strikebreaking statutes already exist.



worthy of legislative attention. One such problem is that of picket line violence. Another is the need to protect the bargaining power of unions in circumstances where replacements are readily available, while at the same time protecting the interests of employers who are especially vulnerable to shutdowns.

The danger of picket line violence, although an appropriate subject for state and local legislation, does not in itself justify the prohibition of labor replacement. The primary cause of these disturbances has repeatedly been shown not to be the entrance of replacements into the employer's place of business, but rather the mass picketing situation created by the union in an attempt to block their entrance.<sup>103</sup> While peaceful picketing is a protected activity, mass picketing which by force tries to prevent access to or egress from a place of business is not.<sup>104</sup> Furthermore, federal labor policy, by including replacement in those weapons allowed management, has in effect created a "right to replace" in the employer.<sup>105</sup> If the local government must take sides in its attempt to prevent violence, it should be the side with the legally protected right.<sup>106</sup>

But a complete resolution of the problems of strikebreaking must extend beyond the application of stringent measures against mass picketing, since this by itself would tend only to weaken the bargaining position of labor by making labor replacement more feasible. Also, in light of the national scope of already existing labor legislation, the nationwide bargaining in many industries, the interstate character of labor markets and the need to preserve the uniform effect of national labor policy, it seems preferable that basic labor objectives (insofar as they affect businesses under the jurisdiction of the National Labor Relations Board) be obtained by legislation at the federal level, rather than by piecemeal state criminal statutes.

The bills recently introduced in Congress<sup>107</sup>—which, like the state statutes, prohibit outright the use of "customary and repeated" strikebreakers and those referred by third parties—do not provide a fair or comprehensive answer. They would impose a heavy and unjustified burden on those industries, such as newspapers, which must rely on such persons, and would not affect the situation in which the employer may readily draw from a large supply of local unemployed. Any such legislation, to be effective, should instead apply equally to employers or unions regardless of circumstances. At the same time it must protect employers acting in good faith from the blackmail effect which might

<sup>103</sup> See generally Stewart & Townsend, *Strike Violence: The Need for Federal Injunctions*, 114 U. PA. L. REV. 459 (1966); Note, 113 U. PA. L. REV. 111, 123-28 (1964).

<sup>104</sup> See *id.* at 120.

<sup>105</sup> NLRB v. Mackay Radio & Tel. Co., 304 U.S. 333, 345 (1938).

<sup>106</sup> See Note, 113 U. PA. L. REV. 111, 136 (1964).

<sup>107</sup> S. 1781, H.R. 9422, H.R. 10536, H.R. 10623, H.R. 10746, 89th Cong., 1st Sess. (1965).

result if unions were allowed to shut them down with impunity. Although a provision requiring compulsory arbitration of all labor disputes might be effective in preventing abuses by either party, such a remedy would have profound effects on national labor policy not justified by the limited scope of the problems involved in strikebreaking.<sup>108</sup>

One method would be to incorporate the use of labor replacements into the list of prohibited employer practices of the National Labor Relations Act. But to prevent the sanctioning of injustice and union abuses, any restrictions on the use of replacements should at least make exceptions for cases where the strike is in breach of contract, or in support of demands outside the permissible scope of collective bargaining, or where the union has committed an unfair labor practice by refusing to bargain in good faith.

In regard to unlawful or unfair labor practice strikes, the present law should be left unchanged. Where the strike itself is unlawful (either under the National Labor Relations Act or under a collective bargaining agreement) the employer should be permitted freely to use labor replacements. Where the strike is called to protest an employer unfair labor practice, the use of temporary replacements should also be permitted while the issue is being litigated, since if an unfair labor practice is found, the National Labor Relations Board, under existing law, may order the reinstatement of the strikers.<sup>109</sup>

The solution thus lies in the application of such legislation to economic strikes and bargaining lockouts. But even in these areas, prohibition of the use of replacements would raise problems in those cases where the power to replace is the only effective weapon which the employer has to back up his bargaining position with the union. To deprive him of this power would be detrimental to collective bargaining, which is promoted when the two parties are of relatively equal strength. There are two sides to this argument, both based on the doctrine of letting economic circumstances cast the burden where they may. It can be argued on behalf of prohibiting replacement that employees in industries less able to withstand shutdowns should be allowed to reap the benefit of their enhanced bargaining position, and thus command higher wages. But it can just as easily be said in support of the present system that employees, in jobs for which replacements can be obtained, should accept the consequences of their less favorable bargaining position and think twice before striking. Any simple resolution of this dilemma—either by prohibiting replacement in economic strikes or by leaving the present federal law unchanged—would thus be tantamount to siding with either management or labor, and would result in some inequities in either case.

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<sup>108</sup> Note, *Arbitration of Disputes Over New Labor Contract Terms*, 15 W. RES. L. REV. 735, 740-44 (1964).

<sup>109</sup> Labor Management Relations Act § 10(c), 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

The answer to the problem is to formulate some standard for determining when labor replacements may be used. The goal is twofold: to allow employees to strike in support of reasonable demands without fear of losing their jobs to replacements, and yet not to tie the hands of an employer when the union's demands are unreasonable or excessive. The determination of what constitute reasonable terms of settlement in a given dispute would best be made by some form of arbitration. However, it is not necessary that the arbitration actually be carried out in order to decide whether or not replacements may be used. All that is required is that a party who is willing to submit the dispute to binding arbitration not be prejudiced by the other's refusal to do so.

For example, if before the strike or lockout an employer makes a bona fide offer to arbitrate and the union refuses, he should not be prevented from hiring labor replacements to continue his business. The employees would have no grounds to complain, since they would have been offered an ample opportunity to achieve a reasonable settlement without risking their jobs. If the employer fails to make such an offer, he should not be allowed to use replacements. He will now have no grounds to complain of "labor blackmail," since he could have protected himself by offering to arbitrate. Similar legislation at the state level would be appropriate for those instances where the NLRB declines or lacks jurisdiction.

As an example of how labor replacement regulations might be formulated under the National Labor Relations Act, an amendment to section 8(a) of the act would provide:

It shall be an unfair labor practice for an employer involved in a lawful economic strike or lockout to employ any person hired for the purpose of replacing an employee involved in such strike or lockout unless, prior to such strike or lockout, the employer shall have made a bona fide offer to the union to submit all issues in dispute to binding arbitration.<sup>110</sup>

If the employer violates this provision, the strike would be transformed into an unfair labor practice strike. The National Labor Relations Board would be authorized to seek a court injunction<sup>111</sup> against the employer's use of replacements and to order the reinstatement of the aggrieved employees, possibly with back pay.<sup>112</sup>

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<sup>110</sup> To avoid a possible impasse between the parties in selecting an arbitrator, the proposed legislation should also contain procedures under which such arbitrator could be appointed by a disinterested third party, such as the Federal Mediation and Conciliation Service, which was established by § 202 of the Labor Management Relations Act, 61 Stat. 153 (1947), as amended, 29 U.S.C. §§ 172-173 (1964).

<sup>111</sup> 61 Stat. 149 (1947), as amended, 29 U.S.C. § 160(j) (1964).

<sup>112</sup> 61 Stat. 147 (1947), 29 U.S.C. § 160(c) (1964).

Although this may at first glance seem to be a radical departure from the present theory of free collective bargaining, it should be remembered that compulsory arbitration itself is not unknown to federal labor legislation.<sup>113</sup> The present proposal would have a far less pervasive effect on the national economy than a general compulsory arbitration law, since it would affect only those limited situations in which labor replacement is feasible. The proposed system would be more accurately characterized as a form of "voluntary arbitration" of new contract terms,<sup>114</sup> since it would allow both management and the union the freedom to choose between relying on arbitration as a means of resolving the dispute and upon those economic bargaining weapons which the law would leave available. If the effectiveness of the strike weapon and the right of an employer to protect his business are both to be preserved, it seems that such a system is the only just means of regulating the use of labor replacements.

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<sup>113</sup> The compulsory arbitration of grievances is provided under the Railway Labor Act §§ 3 First, (i), (m), 48 Stat. 1189 (1934), as amended, 45 U.S.C. §§ 153 First, (i), (m) (1964). See *Brotherhood of Locomotive Firemen v. Florida E. C. Ry.*, 346 F.2d 673 (5th Cir. 1965). In 1963, Congress passed a joint resolution providing for the compulsory arbitration of a dispute between railroad companies and locomotive firemen regarding the elimination of jobs on certain trains. Pub. L. No. 88-108, 77 Stat. 132 (1963). Both the constitutionality of the act and the validity of the arbitration award were upheld. *Brotherhood of Locomotive Firemen v. Chicago, B. & Q. R.R.*, 225 F. Supp. 11 (D.D.C.), *aff'd*, 331 F.2d 1020 (D.C. Cir.), *cert. denied*, 377 U.S. 918 (1964).

<sup>114</sup> See generally Note, *Arbitration of Disputes Over New Labor Contract Terms*, 15 W. RES. L. REV. 735 (1964).